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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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AZTEC LAND AND CATTLE COMPANY, your petitioner, prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Arizona, entered in the above-entitled cases on April 21, 1955.

OPINIONS BELOW

The opinion of the Arizona Supreme Court in the Navajo County case (*Aztec Land and Cattle Co.* v. *Navajo Realty Co.; infra*, Appendix A, pp. A1-A15) is reported at 283 P. 2d 227. The opinion of the Arizona Supreme Court in the Coconino County case

(*McCormick* v. *Aztec Land and Cattle Co.; infra,* Appendix A, pp. A16-A18) is reported at 283 P. 2d 234.

JURISDICTION

1. The judgments of the Supreme Court of Arizona were entered on April 21, 1955 (*infra,* Appendix B, pp. A19-A20).

2. The federal question was raised as indicated at pp. 12-15, *infra.* The excerpts from the record showing the raising of the federal question are set out in Appendix C, *infra,* pp. A21-A32.

3. The judgment of the Supreme Court of Arizona in the Navajo County case (*infra,* p. A19) is final by its terms. The judgment of the Supreme Court of Arizona in the Coconino County case (*infra,* p. A20), remanding that case for further proceedings, is final because dispositive of the controversy so far as petitioner's rights are concerned. See *Detroit &c. Ry.,* v. *Michigan R.R. Comm.,* 240 U.S. 564, 570-571; *Clark* v. *Williard,* 292 U. S. 112, 117-119; *Market Street R. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 551; *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, 72.

4. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Whether a state may assess a tax against a private corporation in respect of lands which, at the time of assessment, had not yet been patented to it by the United States, to which the United States then had legal title, of which the United States then had possession, over which the United States then exercised full dominion, and in respect of which the United

States during all of the period in question had been making payments in lieu of taxes to the state and its political subdivisions pursuant to federal law.[1]

STATUTES INVOLVED

The state and federal statutes involved are set forth below in Appendix D, *infra,* pp. A33-A35.

STATEMENT

This single Petition for Writ of Certiorari seeks review, pursuant to Rule 23(5), of two cases that present identical questions and that were accordingly consolidated for argument in the court below. But in the interest of clarity, the proceedings in each case will be set forth separately.

The Navajo County case, No. 5975 below. This was a proceeding brought July 13, 1953, by Navajo Realty Company and other property owners and taxpayers in Navajo County, Arizona, against petitioner Aztec and the appropriate officers of Navajo County, seeking mandamus to direct petitioner to return for purposes of taxation 37,758.56 acres of land, which it was alleged to own, and to direct the several officers to take steps to place that land on the tax rolls for purposes of the assessment and collection of taxes (Complaint, NR. 1-6; Amended Complaint, NR. 17-21).[2]

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[1] The foregoing is the basic question presented. Petitioner does not deem it necessary at this juncture to restate with more particularity "every subsidiary question fairly comprised therein" (Rule 23(1)(c)).

[2] "NR" refers to the Abstract of Record in the Navajo County case, "CR" to that in the Coconino County case.

The record as certified here includes the Abstract of Record in each case that was before the Supreme Court of Arizona, together with the proceedings in that court, as well as certain

It was alleged in the pleadings and in the affidavit in support of the taxpayers' motion for summary judgment that petitioner Aztec was the owner of the lands in question, that these lands were acquired by deed from Santa Fe and Pacific Railroad on November 7, 1905, and that the railroad in turn had acquired those lands from the United States on July 27, 1866, as part of a railroad land grant. The deed from the railroad, submitted in support of the motion for summary judgment (Exh. D, NR. 38), showed on its face that it was a quitclaim deed.[3]

The plaintiff taxpayers further alleged (NR. 23) that petitioner's ownership of the lands had been adjudicated by the U. S. District Court for the District of Columbia in 1949, whose determination had been affirmed by the U. S. Court of Appeals for the District of Columbia Circuit in *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498, and that certiorari to review the latter decision had been denied by this Court on June 2, 1952, 343 U. S. 964 (No. 702, Oct. T. 1951).

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exhibits from the Navajo County case that had been transmitted to the Supreme Court but were not extended in the Abstract.

The amended complaint in the Navajo County case added the County Treasurer as a party defendant (NR. 17-18, par. II).

[3] The granting words of the conveyance (page 2 of the deed, which is included in full in the certified record) are as follows:

> "Now, Therefore, the said Santa Fe Pacific Railroad Company, for and in consideration of the sum of one Dollar, the receipt whereof is hereby acknowledged, does hereby remise, release and quit claim unto the said Aztec Land and Cattle Company, Limited, all its right title and interest in and to the following described lands, situated in the Counties of Navajo and Coconino, in the Territory of Arizona to-wit:"

A copy of the District Court's findings of fact, conclusions of law, and judgment (NR. 27) was submitted in support of the motion.[4]

The District Court's judgment (NR. 27; CR. 43-44) was in these terms:

> "Adjudged, Ordered and Decreed, that the defendants [Secretary of the Interior; Under Secretary of the Interior; Director, Bureau of Land Management] be and they are hereby permanently enjoined from rejecting the selection and application for patent filed by the plaintiff, Santa Fe Pacific Railroad Company, in the interest of its purchaser Aztec Land and Cattle Company, Limited, designated as Phoenix 080632 in the Department of the Interior, on the ground that Santa Fe Pacific Railroad Company had not acquired any interest in the lands selected which it could convey prior to the filing of a release pursuant to Section 321(b) Title III, Part II, of the Transportation Act of 1940, or on the ground that the selection of the said lands is barred by the said release, or on the ground that Aztec Land and Cattle Company, Limited, was not and is not an innocent purchaser for value; and be and they are hereby directed to proceed to a determination of the plaintiffs' selection and application for the issuance of a patent to the said lands, pursuant to the Act of July 27, 1866, 14 Stat. 292, and Section 321(b), Title III, Part II, of the Transportation Act of 1940, 54 Stat. 954, and the Regulations of the Department of the Interior promulgated in Circular No. 1500 (6 F. R. 6699), as lands appropriated to the grant and sold to Aztec Land and

[4] These documents appear in full in the record as certified. They were not extended in the Navajo County case Abstract of Record since they were set forth *in haec verba* in the Coconino County Abstract of Record, CR. 31-44.

Cattle Company, Limited, prior to September 18, 1940."

There was also submitted in support of the motion a copy of Senate Bill 2557, 83d Congress, 1st Session (NR. 27-28),[5] which proposed to authorize the acceptance on behalf of the United States of a conveyance by petitioner of its right, title, and interest in the lands involved in the above-cited litigation, which lands included those involved in the Navajo County case.[6]

The taxpayers further alleged that the United States Department of the Interior was holding in trust for petitioner all money received from sales of timber and other resources from said lands since 1942 (NR. 24).

Petitioner's answer and opposing affidavits denied ownership of the Navajo County lands, and averred that the record title thereto was in the United States (par. IV, NR. 13) and that the lands were under the sole supervision and control of the United States Forest Service of the Department of Agriculture (NR. 32). Petitioner admitted making application for patents to the land pursuant to the decision in *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498, certiorari denied, 343 U. S. 964, but stated that no patents had been issued and that no title could vest in petitioner until the Department of the Interior had

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[5] Here again, this document was incorporated by reference in the Navajo County Abstract of Record, appears in full in the certified record, and is set out in full in the Coconino County Abstract of Record, CR. 45-48.

[6] S. 2557 was not reported out of committee during the 83d Congress. See History of Bills and Resolutions, 99 Cong. Rec., Part 13, p. 726; 100 *id.*, Part 13, p. 596.

determined that the lands which were the subject of the application were non-mineral in character and not subject to valid prior claims (NR. 32-33).

Petitioner's supporting affidavit also set forth the following:

The provisions of the basic land grant of 1866 (Act of July 27, 1866, 14 Stat. 292, [*infra*, pp. A34-A35]) as to mineral survey had not been complied with as of February 4, 1954, and therefore, until the non-mineral character of the lands had been established, no patent could issue (NR. 33).

Many claims in opposition to petitioner's application for patent were still pending, the validity of which must first be adjudicated by the Bureau of Land Management in the Department of the Interior before a patent could issue (NR. 33-34).

The claim to petitioner's lands here in question "have been in dispute, controversy and litigation from 1886 until 1952", during which period and until the date of the affidavit, February 26, 1954, possession, ownership, and title had been claimed for the United States by both the Interior Department and the Forest Service, and petitioner was excluded from the possession of the lands (NR. 34).[7]

Moreover, during all of this period, the United States "has acted in all respects as the owner of a fee simple title to said lands, has leased said lands to others for grazing purposes and has sold therefrom a valuable crop, to wit, Ponderosa Pine timber, and has

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[7] The lands here in question were withdrawn in 1898 for the Black Mesa Forest Reserve, and are within the exterior boundaries of the Coconino and Sitgreaves National Forests. See *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498, 509.

kept all of the proceeds of said leases and sales, except such portion thereof as have been remitted to the Counties of Navajo and Coconino in lieu of taxes;[8] * * * and that additional large sums have been realized from the leasing or permitting of grazing rights thereon" (NR. 35).

The foregoing allegations were not denied by the taxpayer plaintiffs.

None the less, the Superior Court for Navajo County, in a decision filed March 17, 1954 (NR. 42-50), decided that the District of Columbia judgment "granted mandamus making it mandatory that the Secretary of Interior issue patents to the Aztec Company" and, "The Judgment having commanded the Secretary of Interior to issue patents covering the lands in question, the making of application for patents is, therefore, not a condition precedent to the issuance of patents." Accordingly, the Superior Court

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[8] These payments were made pursuant to 16 U. S. C. § 500, as amended, which provides:

> "Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein."

In April 1950, Congress repealed a second proviso to the foregoing, which had read, "*Provided further*, That there shall not be paid to any State for any county an amount equal to more than 40 per centum of the total income of such county from all other sources."

adjudged that a peremptory writ of mandate should issue, directing petitioner Aztec to list its lands, and directing the County Assessor to assess them (NR. 51-55); and judgment was entered accordingly (NR. 56-58).

Petitioner thereupon moved to vacate the judgment, on, *inter alia,* these grounds (NR. 60-65):

That the court misconstrued the judgment in the District of Columbia litigation, which did not adjudicate the title in favor of petitioner, but simply enjoined the Secretary of the Interior from rejecting the selection on specified grounds, and directed him to proceed to determine petitioner's rights to have the lands patented (NR. 61-62).

That petitioner's application cannot be determined until the mineral survey required by the Act of July 27, 1866, has been completed, and the rights of adverse claimants determined; that until such time petitioner cannot become the owner of the lands; and that ownership remains in the United States until issuance of the patents (NR. 62-63).

That the pleadings and affidavits show without dispute that the legal title to the lands is in the United States, which *prima facie* determines ownership, citing *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496 (NR. 64).

This motion as well as a motion to correct the judgment were duly denied (NR. 84-85), and petitioner appealed (NR. 69, 75).

The Supreme Court of Arizona affirmed.[9] It held

[9] Except as to so much of the judgment below as directed petitioner to list its lands; this portion of the judgment was stricken, and the writ of mandamus was quashed *pro tanto.*

that there was presented no issue of fact requiring trial, and that the Assessor's list (Exh. C, NR. 30) effectively precluded taxing petitioner in respect of lands theretofore patented to others.

On the federal question involved, the Supreme Court of Arizona held that there was no merit in petitioner's contention that the land was not taxable until its mineral character had been determined, "for, as has been shown, the Circuit Court in the Chapman case held that issuance of the patents by the Secretary to such lands was merely a ministerial act." The court below moreover held, citing 43 U. S. C. § 882 (*infra*, p. A33) and *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512, that the issuance of a patent was not a prerequisite to state taxation, and that in view of Section 73-202 of the Arizona Code Annotated, 1939 (*infra*, p. A33), a claim to land was taxable so that the supervision and control of the United States over the lands in question was immaterial.

A stay of proceedings pending application to this Court was denied by the Supreme Court of Arizona on May 10, 1955. On June 2, 1955, an order granting such a stay "pending the timely filing and disposition of a petition for certiorari" was signed by Mr. Justice Douglas.

The Coconino County case, No. 5929 below. This was a similar proceeding by a group of Coconino County taxpayers in respect of some 60,932.29 acres of land in that County, allegedly belonging to petitioner and acquired in the same manner as the lands in the Navajo County case, which was brought against petitioner to list these lands, and against the county assessor and the board of supervisors to assess the lands and place them on the tax rolls (CR. 1-5).

Petitioner and the public officials filed separate motions to dismiss on the ground that the complaint did not state a claim upon which relief could be granted (CR. 21-23), and petitioner filed an answer averring that title to the lands in question was in the United States (CR. 24-26). Plaintiff's reply set up the proceedings in *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498 (App. D. C.), certiorari denied, 343 U. S. 964, and S. 2557, 83d Cong. (CR. 27-48). After the motions to dismiss were granted (CR. 49), an amended complaint, naming only petitioner and the county assessor as defendants, was filed (CR. 49-53); this was also dismissed on motion (CR. 60-63), and the taxpayer-plaintiffs appealed (CR. 63).

Included in the lands which the plaintiffs sought to have taxed to petitioner was Sec. 13, T. 14 N, R. 9 E, and the E ½ of Sec. 33, and SW ¼ of Sec. 35 in T. 14 N., R. 11 E (CR. 2, 7, 10, 18, 50).

The Supreme Court of Arizona reversed, holding that (*infra*, p. A17) "under our decision in the Navajo County case, the ruling in the instant case cannot be upheld on any theory." Accordingly (*infra*, p. A18), "the amended complaint is ordered reinstated along with the alternative writ of mandamus as to the county assessor; and the cause remanded for further proceedings not inconsistent with our holdings in these matters."

The stay sought from and then denied by the Supreme Court of Arizona, and that granted by Mr. Justice Douglas on June 2, 1955, covered this case also.

Issuance of Patents. In its opinion (*infra*, p. A11), the Supreme Court of Arizona said, "As proof of Aztec's fear that patents would not be forthcoming

was more fanciful than real was the admission made at time of oral argument that a short time prior thereto to the first of these patents, covering some 5,000 acres, had been received."

Bureau of Land Management proceedings within the realm of judicial notice[10] show that on September 21, 1954, and November 12, 1954, numerous protests against the Santa Fe Pacific Railroad Company's application for patent were dismissed (Phoenix 080632); that the application was rejected as to Sec. 13, T. 14 N., R. 9 E., which was determined to be mineral; that the land applied for in T. 14 N., R. 11 E., was unsurveyed and therefore not subject to patent; that on January 11, 1955, a patent issued to the Railroad Company for 5,619.96 acres of the land as selected, and another on March 25, 1955, for an additional 87,847.86 acres; and that patent for the balance of the lands due, estimated as involving between 1500 and 2100 acres, has not yet been issued as of the date of the filing of this Petition.[11]

HOW THE FEDERAL QUESTION WAS RAISED

(a) *Navajo County case.* (i) Petitioner in par. IV of its answer alleged that the record title to all of the lands in question was in the United States (NR. 13; *infra,* p. A21).

(ii) Plaintiffs below, in par. III of their amended complaint, alleged that petitioner acquired the lands

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[10] See *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308, 312 (App. D. C.), and cases there cited.

[11] On April 12, 1955, Santa Fe duly quitclaimed the patented acreage to petitioner, in confirmation of its earlier 1905 deed (*supra,* p 4, note 3).

by deed from Santa Fe in 1905, which in turn acquired the lands as a portion of a railroad land grant from the United States dated July 27, 1866 (NR. 18; *infra,* p. A21).

(iii) Plaintiffs in par. III of their reply alleged that the ownership of the lands had been adjudicated by the United States District Court for the District of Columbia, and set out its findings, conclusions and judgment (NR. 23, 27; *infra,* pp. A21-A22); that said judgment was affirmed, citing 198 F. 2d 498, and that certiorari was denied by this Court on June 2, 1952, citing 72 U. S. [actually Sup. Ct.] 1058, rendering the judgment final (NR. 23; *infra,* p. A22); that the funds received from the sales of resources on said lands are being held in trust for petitioner, and that a bill is pending in Congress to authorize acceptance of petitioner's deed, setting forth S. 2557, 83d Cong. (NR. 24, 27-28; *infra,* p. A22).

(iv) Plaintiffs moved for summary judgment on the basis of the above findings, conclusions and judgment of the District Court, the opinion of the Court of Appeals in *Chapman* v. *Santa Fe Pac. R. Co.,* 198 F. 2d 498, and the above bill (NR. 29-30; *infra,* pp. A22-A23).

(v) Petitioner's affidavit in opposition alleged title to the lands in the United States, and control by the United States, and the non-issuance of patents pending determination of mineral character and the validity of conflicting claims; it alleged that the provisions of the basic land grant with respect to mineral surveys had not been complied with, citing the Act of Congress of July 27, 1866 (14 Stat. 292); that the claim to the lands in question had been in dispute and litigation from 1886 until 1952; and that the United States has at all times exercised dominion over the lands, has sold

timber therefrom, and has kept all the proceeds except as to such portion thereof as has been remitted to the Counties of Navajo and Coconino in lieu of taxes; and that possession and use of the lands has never been vested in petitioner (NR. 31-36; *infra,* pp. A23-A25).

(vi) The decision of the Superior Court (NR. 42-50; *infra,* pp. A25-A29) proceeds on wholly federal grounds, and cites, quotes from and discusses federal statutes and decisions.

(vii) Petitioner's motion to vacate judgment asserts that the foregoing decision misconstrues the final judgment of the U. S. District Court for the District of Columbia, above referred to, and the holding of the Court of Appeals in *Chapman* v. *Santa Fe Pac. R. Co.,* 198 F. 2d 498, affirming the same; that no mineral survey has been completed as required by the Act of July 27, 1866; and that since legal title to the lands is in the United States, this fact prima facie determines ownership, citing *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496 (NR. 60-65; *infra,* pp. A29-A31).

(viii) The opinion of the Supreme Court of Arizona (*infra,* pp. A1-A15) shows on its face that it rests on federal grounds.

(b) *Coconino County case.* (i) Petitioner in par. IV of its answer alleged that the record title to all of the lands in question was in the United States (CR. 25; *infra,* p. A31).

(ii) Plaintiffs in par. III of their reply alleged that the ownership of the lands had been adjudicated by the United States District Court for the District of Columbia, etc. (CR. 28-29; *infra,* pp. A31-A32); this allegation is identical with that made in the Navajo

County case, summarized in item (a) (iii), *supra*, p. 13.

(iii) Plaintiffs in par. II of their amended complaint alleged that petitioner acquired the lands by deed from Santa Fe in 1905, which in turn acquired the lands as a portion of a railroad land grant from the United States dated July 27, 1866 (CR. 50; *infra*, p. A32).

(iv) The Supreme Court of Arizona in its opinion (*infra*, p. A17) said that "The pleadings in the instant case are in all essential respects identical with those in the Navajo County case and—though there are no affidavits and only one exhibit—basically the issues presented and the legal points relied upon are the same. * * * under our decision in the Navajo County case, the ruling in the instant case cannot be upheld on any theory."

REASONS FOR GRANTING THE WRIT

The ruling of the Arizona Supreme Court improperly subjects petitioner to taxation in respect of property which it neither owned or possessed prior to issuance of patent, over which the United States exercised full dominion, and in respect of which the counties involved have already received payments in lieu of taxes from the United States.[12] Further, as to some of the lands now involved, no patent has yet been issued, and as to the acreage determined to be mineral, no patent will ever issue. Yet under the rationale of the rulings now sought to be reviewed, petitioner must pay taxes on all of these tracts back to 1949, or even farther back, a time when its right thereto was still being bitterly contested by the United States.

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[12] Pursuant to 16 U. S. C. § 500, as amended, set out *supra*, p. 8, note 8.

It is one matter to uphold retroactive state taxation where the taxpayer has at some time enjoyed the benefits of the property taxed. E.g., *Welch* v. *Henry,* 305 U. S. 134. But never before, so far as petitioner is aware, has a state been permitted to assess a tax on property over which the United States exercised full dominion under a claim of right, and in respect of which the United States had already made payments in lieu of taxes to the state's political subdivisions pursuant to federal law.

Apart from its inherent unfairness, unfairness which actually extends to constitutional proportions, the result reached by the Supreme Court of Arizona is in clear conflict with the rationale of numerous decisions here. *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496; *United States* v. *Anderson,* 194 U. S. 394; *Irwin* v. *Wright,* 258 U. S. 219. Those cases teach that, until an equitable title passes from the United States, by approval of the selection list or issuance of certificate, the property is not subject to state taxation. Here petitioner's right to all of these lands was in litigation until June 1952, and, since mineral lands were not subject to selection by the very terms of the granting act (*infra,* p. A35), nothing could pass until the non-mineral character of each separate tract had been determined, determination which was not made until late in 1954. Not until then did petitioner have such an equitable title to particular land that was subject to state taxation.

The ruling below completely misapprehends the nature of petitioner's claim to the lands prior to 1954. All that was directed by the final judgment of the United States District Court on January 14, 1949, was that the Secretary of the Interior and his subordinates

(a) were enjoined from rejecting the selection on the ground that selection was barred by Santa Fe's release or on the ground that petitioner was not an innocent purchaser for value; and that they (b) were directed to proceed to a determination of the selection (NR. 27; CR. 43-44). That was all that could properly have been directed; the Secretary could not have been ordered in terms to issue a patent. See *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238.[13] Even that direction to proceed to a determination of the selection did not become final until, after affirmance by the Court of Appeals (*Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498), this Court denied certiorari on June 2, 1952 (343 U. S. 964). And until the Interior Department, late in 1954, completed its determination of the character of the land as mineral or otherwise, the very terms of the granting act (*infra*, p. A35) prevented the passing of even a beneficial interest; nor, until adverse claims had been adjudicated, could the extent of petitioner's rights to specific parcels of land be determined. Not until then was it possible for anyone to identify the particular tracts that passed to this

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[13] There the court below had remanded the cause "with instructions to enter a decree restraining defendants from rejecting and canceling plaintiff's selection list, with directions to vacate the order withdrawing the land in suit for a power site, and to approve plaintiff's selection for patent." *Central P. R. Co.* v. *Lane*, 46 App. D. C. 374, 395. This Court however concluded (*Payne* v. *Central Pac. Ry. Co.*, 255 U. S. at 238) that "an injunction should issue directing a disposal of the selection on its merits, unaffected by the withdrawal. Such an injunction, we think, is better suited to the occasion than that indicated by the Court of Appeals." The final judgment in petitioner's case against the Secretary (NR. 27; CR. 43-44) followed this Court's ruling in the *Central Pacific* litigation.

petitioner.[14] And possession was not relinquished until, by the issuance of patents, title to the land passed from the United States.[15]

The fact that, more than three years after the termination of the litigation, the Land Department has not yet completed its adjudication of petitioner's claims, is eloquent evidence that, *non constat* the assumption of the court below (*infra*, pp. A7, A9), more than simple ministerial action on the Secretary's part was involved.

Nor was the Arizona Supreme Court on sounder ground when it rested its ruling on 43 U. S. C. § 882 (*infra*, p. A33) and *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512.

That statute, which was part of the Act of July 10, 1886, c. 764, 24 Stat. 143, was passed to obviate the result of the decisions in *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; and *Northern Pacific R.R.* v. *Traill County*, 115 U. S. 600, which had held that railroad grant land was not taxable by the states where patents had not been

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[14] As has been shown, *supra*, p. 12, one tract was excluded in 1954 because mineral; one because it was not yet surveyed; and patent to a substantial acreage had not yet issued at the time of filing of this Petition. Under the decisions sought to be reviewed, however, all of these tracts are taxable to the petitioner back to at least 1949.

[15] See letter from Assistant Secretary of Agriculture E. L. Peterson, April 29, 1955, referring to these very Aztec lands, 101 Cong. Rec. 6059 (daily ed., May 26, 1955): "Forest Service responsibility ceases completely the day title passes and any contractual relations the Forest Service may have with timber operators, stockmen, or other national forest users become null and void."

issued, because until then title thereto was in the United States, even where non-issuance of the patents was a consequence of the railroad grantees' wilful default in payment of survey fees in order to avoid issuance of patents so that the grantees could escape such taxation. The railroads could and did sell their unpatented lands to purchasers with the extra inducement of freedom from local taxation (17 Cong. Rec. 3719). Hence the purpose of the statute, as its sponsors indicated, was to waive the Government's lien (17 Cong. Rec. 5142-5143, 5145), and to tax those who exercised dominion over the granted lands (17 Cong. Rec. 2201, 5145). But, "If the companies are not entitled to the land—and by this bill we do not propose or pretend to pass upon that question—if they are not entitled to the lands, then under this bill the lands would not be taxable" (17 Cong. Rec. 6166). Therefore when, in *Central Pacific Railroad* v. *Nevada,* 162 U. S. 512, this Court sustained a state tax on unpatented railroad land, it was dealing with lands that had been in the company's possession for thirty years, and that the company had offered for sale and sold as its own (162 U. S. at 526).

It may be conceded that the retention of bare legal title in the United States is not material. But the Arizona court is completely in error in holding that the fact of the Government's supervision and control over the lands in question is "unimportant" (*infra,* p. A8). For neither the statute nor the decision cited constitute authority for assessing a state tax in respect of property which at the time of such taxation was in the possession and enjoyment of the United States under a claim of right—the situation here. And this petitioner, far from refusing to pay survey fees in order to avoid issuance of patents, had no opportunity

to pay such fees prior to 1954 and 1955 because it was not earlier recognized by the United States as entitled to the lands in question.

Finally, the Arizona court relied upon the terms of Section 73-202, Arizona Code Annotated, 1939 (*infra*, p. A33), defining real estate subject to taxation as including a "claim to * * * any land". But it is hardly possible to support the ruling below on the basis that a state may tax, and hence burden, a claim against the United States pressed under and pursuant to an Act of Congress before that claim has been recognized as valid by the United States.[16]

The present petition does not present any question of labels, any niceties as to "title", "equitable interest", or the like; nor is petitioner seeking to avoid state taxation where it is in full beneficial ownership of property the legal title to which is in the Government as trustee. Cf. *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717. Subsequent to the issuance of patents, petitioner duly returned the patented land for taxation. All that petitioner asserts here is that it cannot be legally assessed state taxes before then, in respect of property which at all times material to this litiga-

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[16] Little time need be spent on the suggestion of the Superior Court of Navajo County, based on the allegations in the taxpayers' reply (NR. 24) that all money received from sales of the timber on the lands since 1942 is being held in trust for the petitioner, that "This in itself indicates that the government recognizes ownership in the Aztec Company" (NR. 49). The short answer is that for ten years after 1942 the Government was vigorously denying that petitioner had any rights whatever in the land. See *Atlantic & Pacific R. Co. et al.*, 58 I. D. 588; *Krug* v. *Santa Fe Pac. R. Co.*, 158 F. 2d 317 (App. D. C.); *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498 (App. D. C.), certiorari denied, 343 U. S. 964 (No. 702, Oct. T. 1951; June 2, 1952).

tion was in the possession of the United States, over which the United States exercised the fullest dominion, and in respect of which the United States has already made payments in lieu of taxes to these very counties pursuant to Act of Congress.

Petitioner is aware that other cases similar to these two may not be of frequent future occurrence, and that the very misconstructions and misunderstandings of federal law which permeate the opinion of the Arizona Supreme Court are so egregious that they will not often be repeated. But if extraordinary mutilation of a federal right by a state court should in and of itself militate against review here, then such rights will have become *caput lupinum* in state courts, and can there be disregarded with impunity, because of virtual immunity from correction.

Petitioner therefore submits that, where the obviously erroneous result, as a matter of federal law, that is reached by a state court is as unfair and indeed as outrageous as that involved in these cases, review should be granted in order that the substantial federal question presented may be correctly determined, in accord with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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